

**AFL-CIO LAWYERS COORDINATING COMMITTEE  
UNION LAWYERS CONFERENCE**

**COALITIONS WITH UNION ALLIES  
Legal and Practical Considerations**

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**INTRODUCTION**

With the decline of union membership the number of strikes has also declined, and litigation has declined as well, whether it be the traditional injunction actions during strikes or litigation seeking damages. However, growing numbers of unions, along with alternative worker organizations, and allies in the faith and social justice community (example: Jobs With Justice) have increasingly engaged in mass action tactics in labor and related disputes which create a risk that more unions will face litigation issues. Some unions, like UNITE HERE, SEIU, and the

UFCW, have faced civil Rico lawsuits which can kindly be characterized as SLAPP lawsuits directed against peaceful but creative activities protected by Section 7 and the First Amendment.

Working with alternative forms of worker and community organizations is an important part of labor's outreach. It also involves decision-making with groups which are likely to be more decentralized and/or which are organizationally complicated in decision-making (example: Occupy Wall Street). That may complicate the traditional union decision-making and how we provide legal advice.

The AFL-CIO will be naming some of these organizations to committees at the 2013 AFL-CIO Convention. Some worker centers have been given membership in Central Labor Councils. Others, such as the National Taxi Workers Alliance, have received charters from the AFL-CIO. The following are examples of alternative worker organizations with whom labor is working, often in coalitions with allies in the faith, community, civil rights, and environmental organizations:

Jobs with Justice

National Taxi Workers Alliance

Restaurant Opportunities Centers United

National Domestic Workers Alliance

National Day Laborers Organizing Network

Our Walmart

LA Clean Carwash Campaign

Warehouse Workers for Justice

While crucial, and a welcome development, working in such coalitions comes with legal issues that present a twist on what our labor clients normally deal with. There is currently little

case law on some of these issues although we will likely see emerging lines of cases in coming years. At times these coalition efforts have been met with SLAPP lawsuits and NLRB charges. How can we, as advocates for our labor clients, encourage and not stifle these alliances and the use of more creative activities, while protecting our clients legally?

Some issues that may arise include:

1. Alternative worker organizations that do not wish to be considered labor organizations because of potential NLRA and LMRDA compliance issues.
2. Complaints filed at the Department of Labor for the failure of newly emerging worker organizations to file LM reports with the Department of Labor.
3. Unions with no present intent to organize who work in coalitions with other organizations that may engage in activity that could present issues for the union under §8(b)(7) if there was an organizational objective.
4. Unions are members of a coalition that decides to take actions which coalition allies can do under the First Amendment, but which a union might be prohibited from doing because of potential § 8(b)(4) issues.
5. At what point can a union be held liable for the alleged illegal actions of a coalition or coalition members, of which it is a member, under agency principles?

## **I. WHAT IS A LABOR ORGANIZATION?**

The NLRB has rarely addressed the question of how community groups advocating on behalf of workers fit into the definition of a Section 2(5) labor organization. While there have been cases addressing incipient labor unions and employee committees, few have involved advocacy groups such as worker centers. With the extraordinary increase in the number of worker centers over the past ten years, this is likely to change.<sup>1</sup> If determined to be a “labor

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<sup>1</sup> A number of recent law review articles have addressed this subject. *See e.g.*, Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law*, 30 Berkeley J. Emp. & Lab. L. 232 (2009); David Rosenfeld, *Worker Centers: Emerging Labor Organizations – Until They Confront the National Labor Relations Act*, 27 Berkeley J. Emp. & Lab. L. 469 (2006); Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. Sch L. Rev. 385 (2006); Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENVER UNIV. L. REV. 93 (2007).

organization” under the National Labor Relations Act, a worker center, or any community group, would obviously be subject to unfair labor practice charges based on its activities.<sup>2</sup> In addition, the organization would be subject to the dictates of the Labor-Management Reporting and Disclosure Act (“LMRDA”), including, *inter alia*, financial reporting requirements, bonding for organization employees, and rules governing the election of officers.

**A. Definition of a Labor Organization under the NLRA**

Section (2)(5) of the NLRA defines “labor organization” as:

Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. § 152(5).

Cases ruling on whether a group constitutes a labor organization have articulated the following test, using the language of the definition: “the organization at issue is a labor organization if (1) employees participate; and (2) the organization exists, at least in part, for the purpose of ‘dealing with’ employers; and (3) these dealings concern conditions of work or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment.” *Polaroid Corp.*, 329 NLRB 424 (1999). Although all three elements must be satisfied in order to find an entity to be a labor organization, the inquiry usually hinges on the second prong, i.e., what constitutes “dealing with” an employer. The first and the third prongs are rarely at issue.

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<sup>2</sup> Section (8)(b) of the NLRA only applies to a “labor organization” or its agents. 29 U.S.C. § 158(b).

In addition, the concept of an “organization” has been construed broadly by the Board. A group will be found to be an organization even if it lacks any formal structure, does not elect officers, and does not meet regularly. *Yale New Haven Hospital*, 309 NLRB 363 (1992) (finding the existence of an organization even though the group lacked a constitution, bylaws or meetings, and did not file documents with the Department of Labor); *Betances Health Unit*, 283 NLRB 369 (1987) (no formal structure and no documents filed with Department of Labor); *East Dayton*, 194 NLRB 266 (1971) (no constitution or officers).

Whether the group “exists in whole or part for the purposes of dealing with employers” has been the subject of extensive litigation, and most of the analysis arises within the context of employer dominated unions or employee committees. Although courts have consistently interpreted the term “dealing with” in section 2(5) to be quite broad, capturing activities beyond the traditional union activity of “collective bargaining,” *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211 (1959), the modern test articulates certain limitations. The Board has explained that “dealing with” must be viewed as a “bilateral mechanism” involving proposals concerning the subjects listed in Section 2(5) coupled with consideration of those proposals by management. *Electromation, Inc.*, 309 NLRB 990, 995 n. 21 (1992). In addition, the Board has explained that the “bilateral mechanism” must consist of a “pattern or practice” in which a group of employees, “over time,” makes proposals to management, and management responds to those proposals by acceptance or rejection. *E.I. du Pont de Nemours & Co.*, 311 NLRB 893, 894 (1993); *EFCO Corp.*, 327 NLRB 372, 375 (1998); *Polaroid Corp.*, 329 NLRB 424; *Vencare Ancillary Services, Inc.*, 334 NLRB 965, 969 (2001), *enf. den. on other grounds*, 352 F.3d 318 (6<sup>th</sup> Cir. 2003). However, where “there are only isolated incidents [in] which [a] group makes ad hoc proposals to management followed by a management response...the element of dealing is missing.” *E.I.*

*du Pont*, 311 NLRB at 894; *see also Stoodly Co.*, 320 NLRB 18 (1995) (no pattern or practice where there was only one incident in which committee made proposals to management).

In *E.I. du Pont*, a number of employee-employer committees were set up not to address a particular grievance by employees, but instead to create a lasting process by which management and employees could find mutual solutions to workplace issues. The Board found that the initiation of these committees demonstrated a purpose to establish a pattern and practice of employees dealing with employers, and therefore, held that they constituted labor organizations. *E.I. du Pont*, 311 NLRB at 906. *See also Polaroid Corp., supra* (employee-employer committee deemed a labor organization where the committee met 62 times in one year and four months, employees made proposals, and management responded); *EFCO Corp., supra* (committee deemed a labor organization where the committee evaluated existing employee benefit plans, investigated alternative plans, solicited ideas from other employees, made recommendations to management, and management adopted some of the proposals and rejected others).

However, in *NLRB v. Peninsula General Hospital*, 36 F.3d 1262 (4th Cir. 1994), the Fourth Circuit, applying the *du Pont* test, denied enforcement of a Board order finding that a group of nurses constituted a labor organization. The court found that a couple of instances where a nurse who was both a leader of an employee committee and part of management met with employees about terms and conditions of employment, and the discussion was later responded to by management, did not amount to a pattern or practice. Holding that “isolated incidents of conduct...of employee proposals concerning working conditions, coupled with management consideration...do not constitute ‘dealing,’” the court expressed its belief that “[a]n overly broad construction of the [labor organization definition] would be as destructive of

the objects [of] the Act as ignoring the provision entirely.” *Id.* at 1271-72 (quoting *NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288, 292 (6<sup>th</sup> Cir. 1982).

Similarly, in *Vencare Ancillary Services, Inc.*, the Board held that a group of employees that met and “draft[ed] a memo to the [employer] about [its] decision to cut their wages” was not a labor organization. 334 NLRB at 966. The Board recognized that the committee was formed in order to engage the employer for a particular purpose – addressing the wage cut issue – and found no “pattern or practice.” This isolated incident failed to establish the element of “dealing with.” *Id.* at 968.

With respect to the second part of the analysis – as to whether the organization “exists *for the purpose*, in whole or in part, of dealing with employers” – it is the intent of the organization that controls. The NLRB has found groups of employees to be labor organizations where they sought to “deal with” an employer but never managed to do so. For example, in *Coinmach Laundry*, 337 NLRB 1286 (2002), the ALJ wrote that “an incipient union which is not yet actually representing employees may, nevertheless, be accorded 2(5) status if it admits employees to membership and was formed for the purpose of representing them.” *See also*, *Early California Industries*, 195 NLRB 671 (1972) (group of employees found to constitute a labor organization where the group’s purpose was to negotiate wages, hours and working conditions with an employer, even though it had not yet come to fruition); *Betances Health Unit*, 283 NLRB 269 (the mere making of demands, even if those demands never amount to anything, is evidence that a group’s purpose is to “deal with” an employer).

#### Center for United Labor Action

A case from the 1970's, *Center for United Labor Action*, 219 NLRB 873 (1975) (“*CULA*”), may be the most relevant to circumstances where independent community groups

advocate on behalf of workers. *CULA* makes two Board positions clear: first, that absent a finding that an employee organization has sought to “deal with” an employer, direct action against the employer is protected under the First Amendment, and does not make that organization a “labor organization” under the Act; and second, that an organization’s “mission” is nearly irrelevant to the “dealing with” inquiry, and that only an affirmative answer to the question of whether that organization has sought to deal with the employer can trigger labor organization status.

The Center for United Labor Action was a labor support group with a national headquarters and branches in several cities. In the context of a national boycott against the products of the Farah Clothing, the Rochester branch of CULA picketed a clothing store asking customers not only to refrain from purchasing Farah clothes, but further, not to patronize the store altogether so long as it sold Farah products. In response to § 8(b)(4) charges, the Board examined whether CULA should be considered a labor organization – after all, the group had participated in direct action against an employer, i.e., picketing, leafleting and related activities, and its stated purpose was to “assist minorities, women, consumers, and especially workers in their asserted struggle against organizations which are adversely affecting [workers’] rights or interests.” *Id.* at 873. The ALJ concluded that CULA was not a labor organization; the Board, in a 2-1 decision, affirmed the recommended order but refined the ALJ’s reasoning. In questioning the ALJ’s finding that CULA existed in part for the purpose of dealing with employers, the Board stated: “The difficulty we find with the Administrative Law Judge’s reasoning is that it equates support for what is considered to be a social cause with the desire to represent the individuals in the furtherance of their cause.” *Id.*

The Board recognized that many labor disputes “are viewed by some as problems which extend beyond the confines of the plant involved,” and that “it is not unusual for social activist groups, newspapers, and clergy to actively support the employees’ cause and seek to marshal public opinion in support of it ...” *Id.* at 873. Suggesting that it would not be uncommon to find that some of the individuals in these organizations would meet the definition of “employee” under the Act, the Board stated:

But are we then to conclude that any organization which engages in strike-supporting activities exists, at least in part, for the purpose of dealing with employers over employee labor relations matters? We believe that such a conclusion would be ridiculous on its face. *Id.*

The extent to which this holding protects organizations working to support workers’ rights can only be appreciated with a greater understanding of the mission and conduct of CULA. CULA proclaimed itself to be “an association for working men and women devoted to the improvement of working conditions and the advancement of all workers of all races and nationalities ... It helps to organize the unorganized and aims to make existing labor organizations more effective.” *Id.* at 877. The ALJ, and the dissenting Member, noted that the principal slogan used by CULA asserts: “If you haven’t got a union – fight to get one! If you have one – fight to make it fight!” *Id.* at 874, 877. Despite CULA’s clearly stated intention to help workers improve the terms and conditions of their employment through supporting labor unions, the Board still held that CULA was not a labor organization. The stated mission and purpose of an organization in the context of pursuing a larger social cause was found to be irrelevant to the “dealing with” inquiry.<sup>3</sup>

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<sup>3</sup> While *CULA* pre-dates the advent of worker centers, a number of commentators have assessed the status of worker centers and similar groups under *CULA*. See, e.g., Rosenfeld, *supra* note 1, at 486-89 (arguing that the majority’s reasoning in *CULA* was flawed and agreeing with the dissent that CULA existed at least in part for the purpose of dealing with employers); Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. Rev.

*CULA* has been cited in only one subsequent Board decision, *Northeastern University*, 235 NLRB 858 (1978). There the Board considered whether a chapter of “9 to 5 Organization for Women Office Workers” was a labor organization under the Act, and concluded that it was not. In a decision adopted by the Board, the ALJ compared “9 to 5” to *CULA*, and stated in dictum that “an organization which exists for the purpose of assisting women workers, among others, ‘in their asserted struggle against organizations which are adversely affecting their rights and interests’ but eschews a collective-bargaining role is not a labor organization within the meaning of the Act.” *Id.* at 859.

The issue was also considered in a series of NLRB Advice Memoranda from the same period (though they reached somewhat contradictory conclusions).<sup>4</sup> The General Counsel declined to find “labor organization” status in a number of cases involving community groups. The analysis generally turned on the fact that the organizations were acting primarily in support of a “social cause,” rather than seeking to “deal” with employers with respect to working conditions. In *Casa Azatlan Association Proderechos Obreros*, 13-CG-5 (March 17, 1976), a non-profit corporation serving Latinos picketed a hospital demanding that the employer bargain with representatives of the Latino community. Citing *CULA*, the General Counsel determined that the group was seeking to discuss certain issues with the employer “in the position of a civil rights organization backing the employment related rights of a minority group and not as the selected or designated representative of any group of employees.” *See also, Metro Atlantic/Dekalb SCLC and Mead Caucus of Rank and File Workers*, 10-CP-123 (August 6,

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L. & Soc. Change 397, 413 (2004) (“Under this holding, most workers’ centers would not be considered a ‘labor organization.’”).

<sup>4</sup> It is important to remember that Advice Memoranda do not constitute precedent. *See D.R. Horton, Inc.*, 357 NLRB No. 182, at 18 n.15 (2012) (explaining that an Advice Memorandum only “represents the then-General Counsel’s advice to the Board’s Regional Officers [and] is not binding on the Board”).

1972) (Metro SCLC acting in support of a strike was “essentially a civil rights group” seeking to secure equal job opportunities for minority workers); *United Black Workers Association*, 14-CB-2206 (December 27, 1971) (UBWA essentially a civil rights group of black individuals who joined together for the purpose of securing equal employment for black workers; no evidence that UBWA sought to displace incumbent union or to establish itself as a collective bargaining representative).

However, in *Blue Bird Workers Committee*, the General Counsel found that a committee of former Blue Bird employees acting independently of any official union, was a “labor organization” under Section 2(5). *Blue Bird Workers Committee*, 1982 NLRB GCM Lexis \*10 (1982). The Advice Memorandum distinguished groups such as CULA and 9 to 5, which picketed or handbilled for the purpose of supporting a general social cause, from the Blue Bird Workers Committee (“BBWC”) which engaged in conduct intended to persuade the employer to adopt certain terms and conditions of employment advocated by the group. The General Counsel concluded that BBWC existed for the purpose of “dealing with” employers because “it is clear that BBWC [was] attempting to achieve these employment-related aims not simply by picketing and handbilling but also by communications and discussions with [the employer].” *Id.* at \*11.

In *Acme/Alltrans Strike Committee*, 6 AMR ¶ 14,025, 5033 (April 25, 1978), the General Counsel concluded that a group of former employees picketing an employer constituted a labor organization because the purpose of the picketing was to pressure the employer into hiring the picketers. Even though the Committee had no communications with the employer other than picketing, it was still considered to be a labor organization (“the absence of any evidence that the Committee had any communication with any of the employers ... or that it intended to engage in collective bargaining” was “not dispositive of its status as a labor organization”). *Id.* at 5034.

The General Counsel distinguished the conduct engaged in by CULA, notwithstanding that one of its declared purposes included picketing for reinstatement of discharged employees, because CULA's activity constituted "support for what was considered to be a social cause." *Id.* at n. 6 (emphasis in original). In *Acme*, the Committee's activity was viewed as a desire to represent individuals in the furtherance of their cause, as well as implicitly seeking to deal with employers over matters affecting the employees.

However, in *Michael E. Drobney, an Agent of Laborers Local 498*, 4 AMR ¶ 10,081, 5102 (December 30, 1976), the General Counsel concluded that a group of job applicants who picketed an employer in hopes of being hired was not a "labor organization" because there was no evidence the applicants actually wanted the employer to deal with them as a group, but simply to hire them and others like them in the community. *CULA* was cited in support of this position.

In a more recent Advice Memorandum, the General Counsel considered the question of whether the worker center, Restaurant Opportunities Center of New York ("ROC"), was a labor organization under Section 2(5), and concluded it was not. *Restaurant Opportunities Center of New York*, 2006 WL 5054727 (N.L.R.B.G.C.) (November 30, 2006). ROC, a non-profit 501(c)(3) corporation, was engaged in a campaign against a number of restaurants to improve working conditions. With ROC's support, a number of workers filed FLSA lawsuits and EEOC complaints against several restaurants. In settlement discussions, which ROC participated in, the plaintiffs and ROC made demands that went beyond the remedies available under the particular employment laws at issue – and in fact would be considered typical of issues commonly dealt with in collective bargaining – including paid vacation days, a promotion policy, a scheduling policy and an arbitration procedure. In conjunction with the employees' legal actions, ROC organized mass demonstrations near the entrances to the restaurants, which included chanting,

noisemaking, handbilling, and picket signs. The employers filed unfair labor practice charges alleging, *inter alia*, that ROC was attempting to force representation on employees absent majority support, and was engaging in recognitional picketing in violation of Section 8(b)(7)(C).

The General Counsel concluded that ROC was not a “labor organization” under Section 2(5), and even if it were a labor organization, “its proffer of lawsuit settlement agreements and picketing to encourage lawsuit settlement” did not violate the Act. Noting that most of ROC’s activities – consisting of social advocacy, legal services, and job-support services for restaurant workers – did not fall within the purview of Section 2(5), the Advice Memorandum focused on whether ROC’s attempt to settle the workers’ legal claims constituted “dealing with” the employers over terms and conditions of employment. The General Counsel observed that the “dealing with” requirement had been defined broadly, but citing *du Pont*, noted that the required element of “dealing” only exists when the bilateral mechanism of offer and consideration of proposals entails a “pattern or practice” that extends “over time.”

The General Counsel found that ROC’s conduct in connection with the lawsuits did not constitute a pattern or practice of dealing over time. Rather, the attempts to negotiate settlement agreements with the employers were found to be discrete, non-recurring transactions with each employer – i.e., the parties’ discussions were limited to settling legal claims raised by employees – and the tentative agreement between the parties did not imply an ongoing or recurring pattern of dealing over employment terms and conditions beyond the resolution of the current dispute. Absent evidence that ROC had engaged in a pattern of dealing with employers over time, rather than discrete instances of lawsuit-settlement negotiations, the General Counsel concluded that ROC was not a Section 2(5) labor organization.

**B. Definition of a labor organization under the LMRDA**

The status of an organization under the NLRA does not determine its status under the LMRDA (and vice versa), since the legal definitions differ and the laws are enforced separately. The LMRDA definition of “labor organization,” which in some respects is broader than the NLRA definition, appears in two subsections of the statute, Sections 3(i) and 3(j). Section 3(i) provides, in pertinent part, that a labor organization must be engaged in an industry affecting commerce and includes

any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms and conditions of employment...

29 U.S.C. § 402 (i). Section 3(j) lists five sets forth five categories of labor organization which “shall be deemed to be engaged in an industry affecting commerce” within the meaning of the Act. These include, *inter alia*, (1) all organizations certified as employee representatives under the National Labor Relations Act or the Railway Labor Act, and (2) labor organizations which, though not certified, are recognized or acting as the representatives of employees of an employer engaged in an industry affecting commerce. 29 U.S.C. § 402(j).

Congress “defined labor organizations under the LMRDA broadly ‘to provide comprehensive coverage of labor organizations *in any degree* in the representation of employees or administration of collective bargaining agreements.’” *Donovan v. National Transient Division*, 736 F.2d 618, 621 (10<sup>th</sup> Cir. 1984) (emphasis in original) (quoting S.Rep. No. 187, 86<sup>th</sup> Cong., 1<sup>st</sup> Sess. 53); *see also* 29 C.F.R. § 451.2 (“the language will be construed broadly to include all labor organizations of any kind other than those clearly shown to be outside the scope of the Act”). In *Donovan*, the 10<sup>th</sup> Circuit concluded that a local union representing transient employees that held few in person meetings and did not negotiate “complete collective

bargaining agreements” was a labor organization subject to the LMRDA. The NTD did negotiate agreements which established standards regarding disputes, grievances, hours and other terms and conditions which the court found adequate to satisfy the “dealing with” requirement of Section 3(i). *Id.* at 622.

Very few cases address this issue, and none have dealt with the question of whether a worker center or other community group was a “labor organization” under the LMRDA.<sup>5</sup> It should be noted, however, that one employer did file a complaint with the Department of Labor alleging that ROC was a “labor organization” subject to the LMRDA reporting requirements, and the DOL, after an investigation, determined that it was not. *See Restaurant Opportunities Center of New York*, 2006 WL 5054727, at \*5 n. 8.

## **II. WHEN DOES ACTION/ADVOCACY ON BEHALF OF WORKERS BUMP UP AGAINST THE PROSCRIPTIONS OF SECTION 8(b)(7)?**

Alternative worker organizations and coalition allies frequently assume that the First Amendment protects, without limitation, handbilling, peaceful picketing, and peaceful rallies. However, in the labor context, we all recognize there is a tension between the First Amendment and limitations contained in Sections 8(b)(4) and 8(b)(7) of the Act.

The seminal First Amendment case arose out of CIO organizing drives. *CIO v. Hague*, 307 U.S. 496 (1939). There the court declared that the government holds title to parks, streets, and sidewalks which “... have immemorially been in trust for the use of the public and, time out

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<sup>5</sup> Two commentators have recently speculated on this question. *See* Naduris-Weissman, *The Worker center Movement*, *supra*, at 37-38 (arguing that worker centers would *not* likely be considered “labor organizations” under the LMRDA); Stefan Marculewicz and Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage under the NLRA and LMRDA*, Engage, The Federalist Society’s Practice Journal, Vol. 13, Issue 3 (October 2012) (arguing that worker centers *would* fall under the LMRDA’s “labor organization” definition).

of mind, have been used for the purposes of assembly, communicating thoughts between citizens and discussing public questions. *Id.* at 514-516. In *Thornhill v. Alabama*, 310 U.S. 88(1940), the Supreme Court held that a law prohibiting loitering and picketing was unconstitutional, stating, in relevant part, that the “streets are natural and public places for the dissemination of information and opinion.” However, the Court has rejected the notion that the First Amendment affords the same freedom to picketing as to those who engage in pure speech.<sup>6</sup> This forms part of the rationale for the tension between the First Amendment and § 8(b)(4) restrictions discussed in *DeBartolo*, 485 U.S. 568 (1988). Section 8(b)(7) of the Act limits picketing for the object of recognition, for more than 30 days, without the filing of a petition under Section 9(c). Picketing for other purposes, such as **solely** area standards picketing<sup>7</sup> or **solely** of the purpose of getting a fired worker his/her job back,<sup>8</sup> is not prohibited. Note the emphasis on the word **solely**. The NLRB has found, and continues to find, that if recognition or organization is an object of the picketing, the restrictions of § 8(b)(7) will apply despite the existence of other legitimate objectives. Recognition need only be an object, and not necessarily the sole object, for there to be a violation of § 8(b)(7).<sup>9</sup>

The NLRB engages in a detailed factual analysis to determine the object of the picketing. The following are examples of the factors the NLRB considers, including examples of evidence it does not regard as persuasive. The message of these cases is that care must be taken in these situations, because if you are engaged in a long term campaign involving a particular company, it does not take much to step over the line and find yourself in the cross-hairs of § 8(b)(7).

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<sup>6</sup> *Cox v. Louisiana*, 379 U.S. 284 (1957).

<sup>7</sup> *Bldg. and Construction Trades Council(Houston)(Claude Everett Construction Company)*, 136 NLRB 321 (1962).

<sup>8</sup> *Autoworkers Local 259 (Fanelli Ford Sales)*, 133 NLRB 1468 (1961).

<sup>9</sup> *Plumber and PipeFitters Local 32 (Bayley Construction)*, 315 NLRB 786 (1994).

1. Written disclaimers in the form of a letter to the employer, appropriately worded signs, and written instructions to pickets consistent with a legitimate object are all necessary steps, but at times insufficient in the face of a single remark by a picket that shows a recognitional objective.<sup>10</sup>
2. Self serving words on picket signs may not be considered conclusive evidence; the Board will look at the overall conduct.<sup>11</sup>
3. Affirmatively bad evidence includes picket signs directed to the employees, leaflets requesting employees to join the union, demands for recognition prior to the picketing, and picketing for pretextual reasons.
4. However, a demand for a neutrality agreement has been held not to constitute a present demand for recognition.<sup>12</sup>
5. Intermittent picketing over a ten month period has been held to be a violation where the union initially sought recognition.<sup>13</sup>
6. Picketing that began as a community protest over the failure to hire local residents, and was later used by the union to explore the possibility of organizing or recognition did not violate Section 8(b)(7).<sup>14</sup>
7. Where there is a long hiatus between earlier recognitional picketing (subject to a settlement or an injunction) and later informational picketing, the later picketing must strictly comply with the requirements of the Act (or the earlier injunction or settlement).<sup>15</sup>
8. The Board will look not just at what happens the day(s) of the picketing, but also at what precedes it.

The recent issues faced by the UFCW at the NLRB are likely to increasingly be faced by unions working with non-traditional worker organizations and with community allies. Our Walmart is an organization of Walmart workers seeking to improve labor standards and labor rights for employees. Any Walmart employee may join, and thousands have done so. Our

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<sup>10</sup> *Teamsters local 239 (Abbey Auto parts Corporation)*, 147 NLRB 8 (1964), *enf. denied* 340 F.2d 1020 (2d Cir.1965) where the agency of the picketer was not established.

<sup>11</sup> *Plumbers and Pipefitters Local 32 (Bayley Construction)* 315 NLRB 786 (1994).

<sup>12</sup> *New Otani Hotel*, 331 NLRB No.159 (2000).

<sup>13</sup> *Theatrical Stage Employees Local 15(Albatross Products)* 275 NLRB 744 (1985).

<sup>14</sup> *United Mine Workers Local 5926(Sunrise Mining)*, 291 NLRB 644 (1988).

<sup>15</sup> *John's Valley Foods*, 237 NLRB 425 (1978).

Walmart is closely aligned with the UFCW, and in fact is listed on the union's LM reports as a subsidiary organization.

Our Walmart has been engaged in many highly visible mass actions (including strikes and rallies) in recent years. The UFCW and Our Walmart have been careful in the course of the campaign to issue disclaimers concerning the intent of the UFCW and Our Walmart to be recognized and bargain as a representative of the employees. But in a large amount of literature, there were a few documents, letters, or e mails that contained indications of a recognitional objective. This was sufficient to get entwined with § 8(b)(7) issues.

In a Board settlement, the UFCW and Our Walmart signed a letter and a notice reiterating their disclaimer of any recognitional objective, made changes to the UFCW and Our Walmart web sites, including the posting of the letter and notices, and agreed to email the notice to many supporting organizations, including unions, community, and faith groups.<sup>16</sup>

### **III. AGENCY PRINCIPLES: UNION LIABILITY**

#### **FROM ACTIONS OF COALITION PARTNERS**

Community allies engage in conduct that is sometimes authorized and sometimes not, which forms the basis for employer legal actions against unions and coalition allies.

Under federal law, language limiting agency liability is found in the Norris-LaGuardia Act, 29 U.S.C. § 106. The Norris-LaGuardia Act, enacted in 1931, limits the criminal and civil liability of labor organizations to activity that is proven to have occurred with the authorization or participation of the union leadership or ratification by the leadership after it occurred.

1. Unions are generally held responsible, however, for organized mass action by their members. *United States v. United Mine Workers of America*, 77 F. Supp. 563 (D.D.C.

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<sup>16</sup> Letter and notice attached as Appendix A. In some circumstances, the Board may be skeptical of a union disclaimer of interest in representing employees. *SEIU Local 73 (Active Detective Agency)*, 240 NLRB 462 (1979).

1948), *aff'd* 177 F.2d 29 (DC Cir. 1949), *cert. denied*, 338 U.S. 871 (1949). What are the risks that a union could be held liable for the mass action of members of a coalition of which it is a member?

2. Such liability applies to the foreseeable consequences of mass actions, but not unplanned violence/illegal actions unless clear proof of the union's participation, authorization, or ratification can be demonstrated. *Kayser-Roth Corp. v. Textile Workers Union*, 479 F.2d 524 (6<sup>th</sup> Cir. 1973), *cert. denied*, 414 US 976 (1973).

3. The Supreme Court has held that the liability of unions for damages caused by strikes that breach collective bargaining agreements must be determined through the application of common law agency analysis because such actions fall under § 301 of the LMRA. *Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212 (1979); *see also*, *Coronado Coal v. United Mine Workers of America*, 268 U.S. 295 (1925). In order to be liable, the union must be shown to have instigated, participated in, supported, or ratified the activity.

4. In damage actions arising from civil contempt of court adjudications, unions may not be assessed damages that arise from purely legal activity, i.e. vendors refuse to cross a legal picket line.

5. It is well settled that floor purposes of liability issue, agents of the union are not required to be another labor organization as defined in Section 2(5) of the Act.<sup>17</sup> In that case the Division of Advice, while specifically finding that CAMP was not a labor organization under Section 2(5), concluded that that it was an agent of the IBEW in regard to questioned activities and that a complaint should also issue against it alleging violations of Section 8(b)(4).<sup>18</sup>

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<sup>17</sup> *Central Arizona Minority Employment Plan (Division of Advice Memo)* Case No.28-CC-623(Nov.30, 1977)

<sup>18</sup> Also see *IBEW et.al and BB McCormick and Sons Inc. et.al*, 150 NLRB No.37, 150 NLRB 363(1964)

6. Under Rule 65(d) of the Federal Rules of Criminal Procedure, nonparties – i.e coalition allies – can be held in violation of an injunction if the nonparty had notice of the injunction and is “in active concert or participation” with the union already enjoined; that issue is a factual issue for the court.<sup>19</sup>

#### **A. Litigation: Agency Issues<sup>20</sup>**

The agency issues noted above are likely to arise when companies seek state court injunctions against repeated mass actions on or near a company’s property. Many states have “little Norris LaGuardia” statutes which serve to limit the liability of labor organizations in labor disputes. Can this serve to protect coalition allies and alternative worker organizations, some of which do not wish to be considered labor organizations?

For example, the Pennsylvania Anti-Injunction Act (and others like it) embodies a strong public policy against intervention in labor disputes by state courts. *See* 43 P.S. Section 206(a) *et.seq.* and California C.L.P. Section 1138. These statutes serve to limit the issuance of injunctions, and act as parameters for holding a union liable for alleged violations of injunctions.

Moreover, even assuming your state does not have a little Norris LaGuardia statute, many general equitable and legal principles should be useful in dealing with actions of unions, alternative worker organizations, and coalition allies.

#### **B. Criminal Proceedings: Peaceful Disobedience and Agency Issues**

An increasingly common tactic of coalition allies, and some unions, is the use of peaceful civil disobedience. This occurs in streets, entrances to office buildings, corporate shareholder meetings, and elsewhere.<sup>21</sup>

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<sup>19</sup> Marshall v. Blasters Local 29, 30 Fed.R.Serv.2d 866 (S.D.N.Y. 1980). Also see comparable state laws on this issue.

<sup>20</sup> While beyond the scope of this paper, be mindful of the propensity of some employers to file Civil Rico suits against unions for creative and broad ranging campaigns. While these are largely SLAPP suits, there is some danger of liability, but mostly they lead to an enormous diversion of resources to properly defend.

While most are planned, involving non-violent civil disobedience, some are unplanned. What does a union do in terms of providing counsel, reimbursing for fines, and providing bail money? Consider the agency issues that may arise with this, even if no union members or officials are arrested. Of course, in many cases where the union has openly endorsed the civil disobedience, the horse is already out the barn door.

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<sup>21</sup> For example, in Pittsburgh, there are at least 5-6 such instances per year not counting major events such as G-20 meetings. While a detailed discussion of the legal issues arising from such arrests is beyond the scope of this paper please see “Common Questions On Being Arrested in Peaceful Demonstrations, While Leafleting, And/Or From Doing Civil Disobedience”, available on the LCC web site or from the authors of this paper. It provides a good general framework from which to address those issues and can be adapted to your local situations.

## **CONCLUSION**

In an era of increasing conservatism in the courts, it is crucial that we be prepared to defend our clients and think outside the box when they engage in mass actions and other creative strategies.

In any such campaigns, where possible, meet with the clients early on to point out where legal pitfalls might arise at each step of the campaign.